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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CREATIVE ENVIRONMENTS OF HOLLYWOOD et al., Plaintiffs and Appellants, v. USF INSURANCE COMPANY et al., Defendants and Respondents.	B232436 (Los Angeles County Super. Ct. No. BC412641)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Affirmed.

Law Offices of Barry M. Greenberg, Barry M. Greenberg; Law Offices of Pamela Mozer and Pamela Mozer for Plaintiffs and Appellants.

Minehan, McFaul & Fitch and James M. McFaul for Defendants and Respondents.

Plaintiffs and appellants Creative Environments of Hollywood and 201 Westmoreland Associates, Ltd. (collectively Contractor), appeals from summary judgments in favor of defendants and respondents USF Insurance Company (Insurer) and its agent Burns & Wilcox, Ltd. (Agent). Contractor contends: 1) the insurance policy at issue did not exclude coverage for bodily injury to an independent contractor's employee; and 2) triable issues of material fact exist as to whether Agent concealed material information about the policy. We hold the plain language of the insurance policy excluded coverage for bodily injury to independent contractors, including the individual who was injured while performing services for Contractor in this case, and no triable issue of fact has been shown. Therefore, we affirm.

FACTS

In January 2006, Kelley Insurance Agency, on behalf of Contractor, sent an application for "commercial course of construction" insurance to Agent. On February 21, 2006, Kelley faxed a quote to Agent which listed exclusions for the proposed insurance policy, which expressly included employees, independent contractors, and leased or voluntary workers. Contractor had signed the bottom of the quote stating that the coverages, conditions, and exclusions were acceptable.

Insurer issued a commercial general liability policy to Contractor in exchange for Contractor's premium payment of $5,365.10. The policy provided coverage for damages that Contractor might be obligated to pay for bodily injury during the policy period. However, the policy excluded coverage for bodily injury to an employee of the insured arising out of and in the course of employment. An endorsement specifically modified the policy to exclude coverage for bodily injury to "an 'employee,' independent contractor, 'leased worker' or 'volunteer worker' of the insured arising out of and in the course of employment by or service to the insured for which the insured may be held liable as an employer or in any other capacity . . . ."

Contractor had a construction project on North Westmoreland in Los Angeles. Contractor engaged Uribe's Plumbing as a plumbing subcontractor. William Thomas Porter, an employee of Uribe's, was injured in the course and scope of his employment on the site. Porter filed a complaint against Contractor for failing to maintain a safe work environment. Contractor tendered the claim to Insurer, but Insurer concluded the injury to Porter was not covered under the policy.

PROCEDURAL BACKGROUND

On April 28, 2009, Contractor filed a complaint against the Insurer, the Agent, and another insurance agency. The complaint alleged causes of action against the Insurer for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory relief. It alleged a cause of action against the Agent for negligence.

On November 22, 2010, the Insurer filed a motion for summary judgment. Contractor opposed the motion on February 1, 2011, and the Insurer filed a reply.

Agent filed a motion for summary judgment on February 2, 2011, on the ground that it did not breach a duty of care to Contractor.

A hearing was held on Insurer's motion for summary judgment on February 15, 2011. The trial court granted the motion. The trial court entered judgment in favor of the Insurer on March 24, 2011.

Contractor opposed the Agent's motion for summary judgment, and the Agent filed a reply. A hearing was held on April 18, 2011, and the trial court granted the Agent's motion. That day, Contractor filed a notice of appeal from the March 24, 2011 judgment and the judgment that had not been entered yet in favor of the Agent. The trial court entered judgment in favor of the Agent on May 12, 2011.

DISCUSSION

Standard of Review

"Summary judgment 'shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' (Code Civ. Proc., § 437c, subd. (c).) The primary issue before us is whether [the] policy provisions applied on largely undisputed facts. We independently review the trial court's ruling on this question. [Citation.]" (*American Internat. Underwriters Ins. Co. v. American Guarantee & Liability Ins. Co*. (2010) 181 Cal.App.4th 616, 621-622 (*American Internat. Underwriters Ins. Co*.).)

"'Insurance contracts are contracts to which the ordinary rules of contract interpretation apply. [Citation.]' (*Allstate Ins. Co. v. Mercury Ins. Co.* (2007) 154 Cal.App.4th 1253, 1258.) Those rules 'require us to look first to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it. [Citations.]' (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18 [(*Waller*)].) It is the mutual intention of the parties at the time the contract is formed that governs interpretation. (*TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19, 27.) Interpretation of policy language is a question of law. ([*Waller, supra,* at p. 18].)" (*American Internat. Underwriters Ins. Co., supra,* 181 Cal.App.4th at p. 622.)

We consider the policy as a whole and construe the language in context, rather than interpret a provision in isolation. (Civ. Code, § 1641; *Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115 (*Palmer*).) If contractual language is clear and explicit and does not involve an absurdity, the plain meaning governs. (Civ. Code, § 1638; *Palmer, supra,* at p. 1115.) Contractual language is ambiguous and there is no plain meaning only if the language is susceptible of more than one reasonable interpretation. (*Palmer, supra,* at p. 1115.) Exclusionary clauses are construed strictly

against the insurer and liberally in favor of the insured. (*American States Ins. Co. v. Borbor* (9th Cir. 1987) 826 F.2d 888, 894.)

Independent Contractor Exclusion

Contractor contends the employees of an independent contractor were not excluded from coverage under the policy. We disagree.

The plain language of the policy excludes coverage for bodily injury to an independent contractor arising out of and in the course of service to the insured. Uribe's was an independent contractor. Contractor hired Uribe's to perform services on the construction project. Uribe's services on the project for Contractor were necessarily performed by individual workers. Bodily injury to the individual workers who provided Uribe's services on the construction project was excluded from coverage under the policy.

Contractor's interpretation, which would exclude the business entity but none of the individuals who perform the work of the business, would be illogical and render the provision meaningless. A business entity does not suffer bodily injury. The case on which Contractor relies, *North American Building Maintenance, Inc. v. Fireman's Fund Ins. Co.* (2006) 137 Cal.App.4th 627, is distinguishable, because it did not involve an insurance policy that excluded coverage for injury to independent contractors.

Concealment

Contractor contends triable issues of fact exist as to whether Agent concealed information. We disagree.

The evidence was that Contractor, through Kelly, requested a policy that excluded coverage for bodily injury to employees, independent contractors, and others. Contractor received the policy requested. There was no evidence of concealment. The trial court properly granted summary judgment.

DISPOSITION

The judgment is affirmed. Respondents USF Insurance Company and Burns & Wilcox, Ltd., are awarded their costs on appeal.

KRIEGLER, J.

I concur:

TURNER, P. J.

MOSK, J., Dissenting and Concurring

I dissent and concur.

I dissent as to the summary judgment in favor of USF Insurance Company (USF). USF bases its summary judgment motion on what it says is the clear and unambiguous language of the policy. It does not rely on the communications from Burns & Wilcox, Ltd. (Burns & Wilcox) to plaintiffs' agent, Kelley Insurance Agency, which are part of the summary judgment motion by Burns & Wilcox.

I believe there are disputed issues of fact regarding the meaning of the exclusion in issue. Parol evidence may be submitted to interpret a writing even if the language appears clear and unambiguous to the court. (*Pacific Gas & E. Co. v. G.W. Thomas Drayage Etc. Co.* (1968) 69 Cal.2d 33.) The policy language is not so clear and unambiguous, especially when interpreted in accordance with the insured's reasonable expectations. (*E.M.M.I. Inc. v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465, 470-471.)

The exclusion in question is entitled, "Employer's Liability," although admittedly, the endorsement is entitled, "Employees, Independent Contractors, Leased Workers or Volunteers." The exclusion term is a modified from the standard commercial general liability policy exclusion term, even though the insured's requested and seemingly received an "Owners and Contractors Protective Liability" policy.

Plaintiffs submitted evidence, incorrectly excluded, that they expected a liability policy that would only exclude liability to those covered by their worker's compensation policy. (See 1 Leitner, Simpson, and Bjorkman, Law and Practice of Insurance Coverage Litigation § 6:22.) The exclusion covers bodily injury "arising out of [or] in the course of employment by or services to the insured for which the insured may be held liable as an employer." It is not unreasonable to expect the employees of independent contractors are not covered by the exclusion because they would be entitled to workers compensation

from their employers. Plaintiff did not contract with Ms. Porter, the subcontractor's employee and had no control over his activities.

If liability to independent contractors and their employees is excluded, the liability insurance would only cover claims by strangers or adjoining landowners, which were negligible risks. Thus, as interpreted by USF, the policy, having a total cost of over $5,000, is almost illusory.

USF may have reasonable arguments in favor of its position, but I am not prepared to conclude that at this stage it should prevail as a matter of law. Thus, I would reverse the summary judgment as to USF.

The trial court properly granted summary judgment in favor of Burns & Wilcox. There is no evidence it owed any duty to plaintiffs or concealed anything from plaintiffs. It communicated with plaintiffs' insurance broker or agent. It arranged the coverage that it told plaintiffs' insurance broker it was arranging—even if possibly ambiguous. Thus, I would affirm the summary judgment in favor of Burns & Wilcox.

MOSK, J.